Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

FIDELITY WARRANTY SERVICES, INC.,

Petitioner,

v.

BILLY KIDD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

In an original diversity action to compel arbitration, is the amount in controversy determined from the plaintiff's viewpoint, the defendant's viewpoint, or either viewpoint?

II.

Does an action to compel arbitration of a claim, which has been pled in the state court to be a class action not in excess of $75,00 for each class member, meet the diversity jurisdiction amount in controversy requirement, where the federal plaintiff has alleged in good faith that the value of resolving the claims by arbitration exceeds $75,000 and the claims of the state plaintiff and his class are not, as a matter of state law, limited to the amounts stated in his *ad damnum* clause?

STATEMENT PURSUANT TO RULE 29.6

The parent company of Fidelity Warranty Services, Inc. is J.M. Family Enterprises, Inc., and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	1
Statement of the Case	2
Reasons for Granting the Writ	4
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

Barbers, Hairstyling For Men & Women, Inc. v. Bishop, 132 F.3d 1203 (7th Cir. 1997) 5

Barrow S.S. Co. v. Kane, 170 U.S. 100 (1898) 11

Breland v. Ford, 693 So. 2d 393 (Ala. 1996) 6

Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994) 6

Davis v. Carl Cannon Chevrolet-Olds, Inc., 182 F.3d 792 (11th Cir. 1999) 4, 5, 9, 10

Doctor's Associates, Inc. v. Hamilton, 150 F.3d 157 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 867 (1999) 8

Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc., 120 F.3d 216 (11th Cir. 1997) 2, 3, 4, 5, 6

Fidelity Warranty Services, Inc. v. Kidd, 45 F. Supp. 2d 1284 (N.D. Ala. 1999) 1

Glenwood Light & Water Co. v. Mutual Light, Heat, & Power Co., 239 U.S. 121 (1915) 7

Cited Authorities

	Page
St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938)	7
We Care Hair Development, Inc. v. Engen, 180 F.3d 838 (7th Cir. 1999)	8
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1332(a)(1)	1
Rule:	
Fed. R. Civ. P. 59	3

TABLE OF APPENDICES

Page

Appendix A — Opinion of the United States Court of Appeals for the Eleventh Circuit Dated and Filed September 22, 1999 ..... 1a

Appendix B — Memorandum Opinion of the United States District Court for the Northern District of Alabama, Middle Division Dated, Decided and Filed April 22, 1999 ..... 3a

Appendix C — Memorandum Opinion of the United States District Court for the Northern District of Alabama, Middle Division Dated and Filed March 16, 1999 ..... 7a

Appendix D — Order of the United States Court of Appeals for the Eleventh Circuit Denying Petition for Rehearing Dated and Filed December 8, 1999 ..... 14a

OPINIONS BELOW

The opinion below, of the Eleventh Circuit Court of Appeals, is unreported. It is reproduced in the appendix at App.1-2a. Rehearing was denied, in an unpublished order. App. 14-15a.. The district court's order granting a motion to dismiss for lack of subject matter jurisdiction is unreported. App. 7-13a. The district court order denying a motion to reconsider the dismissal is reported at *Fidelity Warranty Services, Inc. v. Kidd*, 45 F. Supp. 2d 1284 (N.D. Ala. 1999). It is reproduced in the appendix at App. 3-6a.

STATEMENT OF JURISDICTION

Judgment was entered by the Eleventh Circuit Court of Appeals on September 22, 1999. App. 1a. Rehearing and rehearing en banc were denied on December 8, 1999. App. 14a. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 28 U.S.C. § 1332(a)(1)

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between —
>
> (1) citizens of different states;

STATEMENT OF THE CASE

Billy Kidd sued Fidelity Warranty Services, Inc. and others in the Circuit Court of Bibb County, Alabama. The suit was a putative class action seeking damages under Alabama law, claiming irregularities arising from vehicle purchase, loan, and service agreements. The Kidd complaint sought "compensatory damages against Defendant Fidelity not to exceed Seventy-Four Thousand Dollars ($74,000) per class member."

Fidelity sued Kidd in the United States District Court for the Northern District of Alabama, seeking to compel arbitration pursuant to an arbitration clause contained in the agreements that prompted Kidd's state court suit. Fidelity alleged diversity and an amount in controversy in excess of $75,000, exclusive of interest and costs.

Kidd moved to dismiss Fidelity's federal action for several reasons, but the district court decided dismissal was required because of "an unmentioned, initial, insurmountable jurisdictional obstacle." App. 9a.

> Therefore, the ultimate jurisdictional question in the present case becomes: "Has Fidelity sufficiently demonstrated the existence of $75,000 or more in controversy?" The answer, provided by *Ericsson GE Mobile v. Motorola Communications*, 120 F.3d 216 (11th Cir. 1997), is "No."

App. 10a.

Ericsson GE involved a federal action seeking to enjoin the execution of a contract between Motorola and the City

of Birmingham, based on a violation of Alabama's competitive bid laws. The Eleventh Circuit held that since the only available remedy was to void the contract, not to have the project re-bid and not to award the contract to the complainant, the value of the relief was too speculative to meet the amount in controversy requirement. *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, 120 F.3d 216, 221-222 (11th Cir. 1997).

The district court in this case concluded that "*Ericsson GE* fit[s] the present case like a glove." App. 12a. The court likened Fidelity's demand for arbitration to Ericsson's request for an injunction, saying "It may be, as Fidelity alleges, that an arbitrator would give Kidd more than $75,000 less than a [Alabama] court and jury would give him, but how can anyone know?" *Id.* The court ordered dismissal, and Fidelity filed a Rule 59, Fed. R. Civ. P., motion with an affidavit of its vice president with additional reasons why the value of arbitration exceeded $75,000 to Fidelity. But the district court again rejected Fidelity's valuation of its claim for arbitration, because Fidelity counsel did not guarantee that the "fees for providing Fidelity's defense in state court will exceed by more than $75,000 the fees they will charge for representing Fidelity in the proposed arbitration proceeding" (App. 4a), and because the "precedential value of a grant of Fidelity's request for arbitration" was too "speculative." App. 5a.

The district court rejected Kidd's contention that his limitation of the state court *ad damnum* clause to $74,000 could defeat Fidelity's federal jurisdictional amount allegation. Saying that if Kidd's state court case was an individual action, his limitation could avoid removal, "but he cannot use that same device as a bar to an original action

filed in federal court, such as Fidelity's action here, when the aggregate recovery, if a class is certified and [the state court] plaintiffs succeed on the merits, will likely exceed $75,000 despite each individual's disclaimer." App. 5-6a . The court again concluded that "the *Ericsson GE* analysis remains an insurmountable obstacle to diversity jurisdiction." *Id.* at 6a.

On appeal, the Eleventh Circuit affirmed. App. 1-2a. The court mentioned that Kidd had "expressly limited his claims to compensatory damages not to exceed $74,000." App. 2a. No mention was made of *Ericsson GE*. The Court of Appeals simply said "We . . . find no error in the [district] court's ruling." App. 2a.

REASONS FOR GRANTING THE WRIT

The decision below presents the important but unanswered question of how to determine the amount in controversy in a diversity action seeking to compel arbitration of state court class action claims that are alleged "not to exceed $74,000" per class member.

It is noteworthy that the state court class action against Fidelity was brought in a state — Alabama — " 'whose courts are among the most widely feared by corporate defendants,' " because of exorbitant awards against foreign corporations. *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 797 (11th Cir. 1999) (internal citation omitted). The Eleventh Circuit, in an "Apologia" recounted the reasons why it thought the "historical justification for § 1332" might support the conclusion that the value of a case could be viewed "from a removing defendant's perspective." *Id.* In *Davis*, the court wrote:

> Thus, even though it may make sense and be fair to a defendant to measure the case from its perspective, as well as the plaintiffs', the Supreme Court has long since closed that door.

Id. at 798.

This case, however, is an original action, and the Court has never really answered the question of whether, in that context, the defendant's viewpoint may also be considered in measuring the amount in controversy. *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, 120 F.3d 216 (11th Cir. 1997), said:

> Whether courts, in determining the amount in controversy, are to measure the value of the object of the litigation solely from the plaintiff's perspective or whether they may also consider the value of the object from the defendant's perspective is considerably less well-established. The Supreme Court has provided no clear guidance on this question, and, as a result, federal courts are divided as to the proper perspective to use in determining the amount in controversy.

Id., 120 F.3d at 218 (footnotes omitted).[1] The panel considered itself "bound to follow the plaintiff viewpoint rule regardless of the wisdom we may attach to it. Only an en banc decision of this court or an intervening decision of

1. The uncertainty has led the Seventh Circuit to acknowledge its dilemma: "Our circuit has an internal disagreement about whether the stakes should be measured by what the plaintiff stands to gain, what the defendant stands to lose, or both." *Barbers, Hairstyling For Men & Women, Inc. v. Bishop*, 132 F.3d 1203 (7th Cir. 1997).

the Supreme Court can alter the controlling law of this circuit." *Id.* at 220 (footnote omitted). The decision noted that a prominent treatise has concluded "that the Supreme Court cases are inconclusive" (120 F.3d at 218, n.8, citing 14A Charles A. Wright et al., Federal Practice and Procedure, § 3703 at 63-66 (1985)), and that the either-viewpoint rule has strong support. *See* 120 F.3d at 220, n.15, *quoting* Wright's comment that the either-viewpoint rule " 'seems to be the desirable rule,' " and 15 James W. Moore, Moore's Federal Practice, § 102.109 [4] at 199 (1997) " 'It is difficult to understand why those [substantial] financial stakes are not implicated when either party stands to gain or lose the statutorily determined amount or its equivalent.' "

The district court in this case recognized that Fidelity's exposure, "if a class is certified and plaintiffs succeed on the merits, will likely exceed $75,000 despite each individual's disclaimer." App. 6a. It has been recognized that the disclaimer in the prayer for relief does not limit the amount of recoverable damages under Alabama law, because its rules of civil procedure allow "a fact finder to give a plaintiff any relief she is entitled to, even if she asked for less." *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1094, 1097 n. 11 (11th Cir. 1994). *See also Breland v. Ford*, 693 So. 2d 393, 397 (Ala. 1996) ("It is well settled that a litigant seeking general damages for personal injuries . . . may recover an account in excess of the amount contained in the *ad damnum* clause of the complaint.")

Thus, there can be no dispute that, viewed from the either-viewpoint rule, the amount truly in controversy in Fidelity's action to compel arbitration exceeds $75,000, just as Fidelity alleged.

> The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal.

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938) (footnotes omitted).

One cannot say to a legal certainty that Kidd's individual state court claim will not exceed $75,000 despite his disclaimer, and that arbitration could not result in a savings to Fidelity of more than $75,000. No can one doubt that the value of Fidelity's total class exposure would not be limited by more than $75,000 if arbitration, not litigation, were required to resolve the claims of Kidd and his class. From the plaintiff's perspective (Fidelity's), from the defendant's perspective (Kidd's, and the class he purports to represent) or from both perspectives, the value of the object of the litigation — to compel arbitration — has a value in excess of $75,000.

This Court has held "that the jurisdictional amount is to be tested by the value of the object to be gained by complainant." *Glenwood Light & Water Co. v. Mutual Light, Heat, & Power Co.*, 239 U.S. 121, 125 (1915). Unlike *Ericsson GE*, where an injunction setting aside Motorola's contract with the City would have no monetary value because no one could know whether the project would be re-bid or whether Ericsson would be the successful bidder, here compelling arbitration has monetary value because arbitration would decide how much, if anything, Fidelity has

to pay. Since Fidelity has alleged, and affirmed in a supporting affidavit, that the monetary difference between arbitration and litigation would be in excess of $75,000, and since it cannot be said to a legal certainty that would not be so from the plaintiff's viewpoint, from the defendant's viewpoint, or from both viewpoints, the jurisdictional amount has been surpassed.[2]

Fidelity's complaint claims a right to arbitrate. If successful, instead of class action litigation in an Alabama state court, Fidelity and Kidd and the class will resolve their dispute *via* an arbitration process. While Fidelity maintains that the value of that process is in excess of $75,000, it is clear that Kidd and the class see a substantial monetary value in avoiding arbitration. Exhibit B to Kidd's class action state court complaint was an affidavit, in which he stated:

> 6. I do not know what arbitration is and I am not familiar with the Federal Arbitration Act. I was given nothing in exchange for being required to sign an arbitration provision.

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2. *Compare, Doctor's Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 867 (1999), where the legal certainty test supported jurisdiction in an action to compel arbitration when the state court plaintiff alleged more than $75,000 in damages even though the agreement he sued on limited damages to $50,000. And in *We Care Hair Development, Inc. v. Engen*, 180 F.3d 838, 841-42 (7th Cir. 1999), a franchisee's state court complaint "sought no more than $74,950 for each plaintiff," but the court, recognizing the difference between removal and an original federal action to compel arbitration, applied the legal certainty test and held "it is the stakes of the arbitration and not the possible state court award that control, and an arbitrator could award more than the amount sought in the state court complaint."

> 7. I do not want to be deprived of my right to trial by jury. If I had known that any of the documents I was signing would have deprived me of my right to trial by jury, I would not have signed them. . . .

Obviously Kidd envisions a larger economic recovery with an Alabama jury than in an Alabama arbitration.

The concurring opinion in *Davis v. Carl Cannon Chevrolet-Olds*, *supra*, a removal case, provides the real life reason why this Court should settle the question surrounding the amount in controversy viewpoint rules in this original action case:

> The plaintiffs allege fraud in the sale of an extended warranty plan for their GM vehicles costing $685 per policy. The lead plaintiffs in the instant case purport to waive all punitive damages and to limit compensatory damages to $75,000 per class member. Even if this waiver were effective, the reality of the situation is that plaintiffs will likely seek to amend their complaint and seek greater amounts of damages after the one year removal window has closed. 28 U.S.C. § 1446(b). I make no comments on the merits of this case. But, if it reaches the trial stage, I am willing to predict that it will be settled. Facing the possibility of an Alabama jury which occasionally brings in "gigantic awards" in cases of this sort (as pointed out by the majority), defendants in this case will be under extreme pressure to settle with the only potential obstacle to settlement being plaintiffs' attorneys fees.

182 F.3d at 799 (footnote omitted) (Nangle, Senior District Judge, concurring). The *Davis* opinion also provides a principled reason for granting review in light of Kidd's carefully calculated individual $74,000 claim, which seeks to *finesse* the amount in controversy requirement:

> Why we look to the value of each plaintiff's claim, rather than to the defendant's total exposure, is lost in the mists of antiquity; no Supreme Court case that this court has been able to locate explains the rationale behind this seemingly arbitrary rule. *See* 14B Charles A. Wright *et al.*, Federal Practice & Procedure § 3704, at 127 (3d ed. 1998) ("The traditional principles in this area have evolved haphazardly and with little reasoning. They serve no apparent policy. . . .").

Id. at 796. Fidelity's exposure as a defendant is large, given the largesse of Alabama juries. As a federal plaintiff, its assessment of the value of arbitration should be accepted.

This Court should resolve the unanswered questions regarding how the amount in controversy should be calculated: from the plaintiff's viewpoint, the defendant's viewpoint, or either or both viewpoints. Resolution of that question will aid the lower courts and promote uniformity in this important area of diversity jurisdiction, and may guarantee the promise of diversity jurisdiction:

> The object of the provisions of the constitution and statutes of the United States in conferring upon the circuit courts of the United States jurisdiction of controversies between citizens of

> different States of the Union . . . was to secure a tribunal presumed to be more impartial than a court of the state in which one litigant resides.

Barrow S.S. Co. v. Kane, 170 U.S. 100, 111 (1898).

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 22, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-11095
Non-Argument Calendar

D. C. Docket No: 98-02042-CV-AR-M

FIDELITY WARRANTY SERVICES, INC.,

Plaintiff-Appellant,

versus

BILLY KIDD,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

(September 22, 1999)

Before BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

Fidelity Warranty Services, Inc. appeals the District Court's Dismissal of its Petition to Compel Arbitration filed by Fidelity against Billy Kidd. Kidd had sued Fidelity in the

Alabama state court on the basis of the purchase of a "service agreement" from Fidelity for $1200.00 in connection with Kidd's purchase of an automobile, and expressly limited his claims to compensatory damages not to exceed $74,000.00. Fidelity then filed its Petition to Compel Arbitration in the United States District Court. The District Court dismissed the Petition on the grounds that it lacked subject matter jurisdiction in that the Petition did not involve the jurisdictionally required minimal amount in controversy. We have considered the argument of counsel and the record below and find no error in the court's ruling.

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION DATED, DECIDED AND FILED APRIL 22, 1999

FIDELITY WARRANTY SERVICES, INC.,

Plaintiff,

v.

BILLY KIDD,

Defendant.

CIVIL ACTION NO. 98-AR-2042-M

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION

* * *

April 22, 1999, Decided
April 22, 1999, Filed; April 22, 1999, Entered

* * *

JUDGES: WILLIAM M. ACKER, JR., UNITED STATES DISTRICT JUDGE.

OPINION BY: WILLIAM M. ACKER, JR.

Appendix B

OPINION: MEMORANDUM OPINION

Plaintiff, Fidelity Warranty Services, Inc. ("Fidelity"), filed a timely motion pursuant to Rule 59 F.R.Civ.P., asking this court to reconsider its order dismissing Fidelity's action without prejudice for lack of subject matter jurisdiction. Fidelity's motion was orally argued after a responding brief was filed by defendant, Billy Kidd ("Kidd"). Fidelity supports its motion not only with a brief but with an affidavit from its senior vice president. That affidavit says: "A quick, efficient, out-of-court resolution by arbitration of the individual claims brought by Kidd against Fidelity Warranty, pursuant to the arbitration agreement that Kidd entered into is worth in excess of $75,000.00 to Fidelity Warranty." Conspicuously, Fidelity's counsel offer no binding commitment (comparable to Kidd's commitment that no plaintiff in his putative class action will seek or accept more than $74,000) that the difference between their fees for providing Fidelity's defense in state court will exceed by more than $75,000 the fees they will charge for representing Fidelity in the proposed arbitration proceeding.

It is a simple matter for a person to hold an opinion of the "worth" of an intangible. Fidelity concedes that *Ericsson GE Mobile Communications, Inc. v. Motorola Communications & Electronics, Inc.*, 120 F.3d 216 (11th Cir. 1997), recognizes a diversity plaintiff's obligation to satisfy the federal court from plaintiff's viewpoint that the amount in controversy exceeds $75,000 if he wants entry. This court fondly remembers its former life as an advocate. He occasionally had clients who were willing to pay sizeable fees to litigate over matters of "principle" that they deemed

important, i.e., "valuable." In fact, the undersigned is himself now a party to a case pending in the Supreme Court of the United States in which the monetary amount in controversy is much less than $75,000, but the principle is worth fighting for. There, reasonable attorneys fees may very well exceed $75,000. The undersigned honestly places a "value" in excess of $75,000 on the resolution of the issues in that case. Others, in all honesty, disagree with that evaluation.

Fidelity's affiant can only be talking about the precedential value of a grant of Fidelity's request for arbitration. Ericsson GE could have fairly and sincerely alleged in its complaint against Motorola that the precedential value of a cancellation of the multimillion dollar contract between Motorola and the City of Birmingham was worth more than $75,000 to *Ericsson GE*. Such an allegation would, however, not have affected the outcome in Ericsson GE. The Eleventh Circuit would not have found that such a self-serving evaluation of the unmeasurable can boot-strap jurisdiction. Precedential value and value quantifiable in terms of money are two different things. One remains speculative. The other can be reduced to money-in-the-bank.

Kidd continues to insist that the value to Fidelity of its claimed right of arbitration is limited by the amount Kidd is suing it for in the state court, namely, $74,000. The court would agree if Kidd's pending case in the state court were an individual case and not a putative class action. Kidd can avoid the removal of a putative class action by limiting in advance and forever the ad *damnum* of each potential class member, but he cannot use that same device as a bar to an original action filed in a federal court, such as Fidelity's

action here, when the aggregate recovery, if a class is certified and plaintiffs succeed on the merits, will likely exceed $75,000 despite each individual's disclaimer.

In this court's opinion, the speculative nature of Fidelity's right to arbitrate under the *Ericsson GE* analysis remains an unsurmountable obstacle to diversity jurisdiction. Accordingly, Fidelity's Rule 59 motion will be denied by separate order.

DONE this 22nd day of April, 1999.

WILLIAM M. ACKER, JR.

UNITED STATES DISTRICT JUDGE

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION DATED AND FILED MARCH 16, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

CIVIL ACTION NO.
98-AR-2042-M

FIDELITY WARRANTY SERVICES, INC.,

Plaintiff,

v.

BILLY KIDD,

Defendant.

MEMORANDUM OPINION

The court has before it a motion filed by defendant, Billy Kidd ("Kidd"), seeking a dismissal of the above-entitled action brought by plaintiff, Fidelity Warranty Services, Inc. ("Fidelity"). The only relief sought by Fidelity is to compel Kidd to arbitrate a dispute between the parties. The jurisdiction of this court is invoked on the basis of diversity of citizenship. The parties have briefed and argued the threshold questions as they view them, but the court is obligated to examine its own subject matter jurisdiction, and, if it determines that it lacks jurisdiction, it is required to dismiss the action *sua sponte*.

Appendix C

The jurisdictional facts are undisputed. Kidd filed a putative class action in the Circuit Court of Bibb County, Alabama, against three defendants, Fidelity, Limbaugh Toyota, Inc. ("Limbaugh"), and First Merchant Acceptance Corporation ("First Merchant"). Kidd's, Fidelity's and First Merchant's citizenships are diverse. Kidd's and Limbaugh's citizenships are non-diverse. Kidd's state court complaint has several aspects. First, it anticipates a reliance by one or more of the defendants upon an arbitration clause contained in the sales agreement between Kidd and Limbaugh that is the central object of the controversy. This agreement constitutes the documentation of the sale of an automobile by Limbaugh to Kidd. Kidd alleges that the clause is an "adhesion contract," "was drawn up by defendants" and was the result of misrepresentation by defendants. In other words, the arbitration clause that Fidelity seeks to enforce is under attack by Kidd in the state court. But Kidd's main claim, upon which he seeks to represent a class of similarly situated persons, is that there are hidden charges in the vehicle purchase agreement, that in the simultaneous loan transaction the charges were purposefully concealed, and that the charges are illegal and due to be cancelled under the law of Alabama. Kidd's complaint further contains a careful disclaimer, made on behalf of all members of his putative class, disavowing all claims by each plaintiff to any sums in excess of $74,000, and expressly waiving punitive damages. Kidd's complaint is crafted to meet the stringent pleading requirements recognized by this court in *Horton v. Alliance Mortgage Company*, CV-98-AR-0581-S, __ WL __ (N.D.Ala. Apr. 28, 1998), as a viable way to defeat any attempt to remove a putative class action from a state to a federal court.

Appendix C

In endeavoring to obtain entry to this court pursuant to 28 U.S.C. § 1332(a)(1), Fidelity alleges: "The value to Fidelity of the relief sought herein exceed $75,000, exclusive of interest and costs."

Kidd challenges this court's jurisdiction, first alleging an absence of the requisite amount in controversy for a diversity removal. The court agrees that the jurisdictional amount is lacking, but for a reason not pointed out by Kidd, who premises his contention upon the carefully drafted monetary limitations in his state court complaint. Kidd next argues that Limbaugh is an indispensable party, so that the required complete diversity of citizenship is lacking. This court might go along with either of both of Kidd's said arguments, if it were not for another, more devastating, jurisdictional defect to be discussed *infra*.

Alternatively, Kidd questions Fidelity's standing to enforce the subject arbitration clause, arguing that Fidelity is not a signatory to the contract containing the clause. Again, the court might agree with Kidd if there were a sufficient jurisdictional basis to trigger a look at the question of standing. Kidd's various contentions in support of his motion to dismiss are, to say the least, intriguing. At another time and place they would be worthy of comment. But they are mooted in this case by what this court finds to be an unmentioned, initial, insurmountable jurisdictional obstacle.

The court starts with the sometimes overlooked proposition that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, is not a jurisdictional statute. The FAA provides nothing more than a **remedy,** both in federal and in state

court, where there is a written agreement providing for the arbitration of disputes between the parties. The statute has a broad remedial application where interstate commerce is implicated in the slightest degree. However, **there must be an independent basis for federal jurisdiction** in order to obtain the FAA remedy in a federal court. *Baltin v. Alaron Trading Corp.*, 128 F.3d 1466 (11th Cir. 1997). Therefore, the ultimate jurisdictional question in the present case becomes: "Has Fidelity sufficiently demonstrated the existence of $75,000 or more in controversy?" The answer, provided by *Ericsson GE Mobile v. Motorola Communications*, 120 F.3d 216 (11th Cir. 1997), is "No."

The opinion in *Ericsson GE* was written for the Eleventh Circuit by Judge Kravitch, who also wrote for the Eleventh Circuit in *Baltin, supra*. In *Ericsson GE*, the Eleventh Circuit concluded that the federal court lacked jurisdiction over an action brought by Ericsson GE ("EGE"), whose proposal to the City of Birmingham for a communications system had been rejected by the City in favor of a competing proposal by Motorola. EGE sought a federal injunction against the implementation of a multi-million dollar contract that had already been executed between the City and Motorola. EGE invoked 28 U.S.C. § 1332 as its basis for federal jurisdiction. Because the subject matter involved millions of dollars, EGE, without hesitation, alleged, in conclusory fashion, the existence of the amount in controversy necessary for § 1332 jurisdiction. Simply put, EGE claimed that the Motorola contract was invalid under Alabama's competitive bid law because it was the result of chicanery. The Eleventh Circuit held:

Appendix C

Although we recognize that there are persuasive arguments to support the adoption of the either-viewpoint rule, as a panel of this court, we remain bound to follow the plaintiff-viewpoint rule regardless of the wisdom we may attach to it. Only an *en banc* decision of this court or an intervening decision of the Supreme Court can alter the controlling law of this circuit.

a. *Value of the Object of the Litigation*

Having determined that the plaintiff-viewpoint rule governs, we now consider whether EGE has alleged an amount in controversy sufficient to satisfy the diversity statute. We first must determine the remedies available to EGE under Alabama law, and then consider the monetary value of the available relief.

* * *

Based on these cases, it appears to a legal certainty that EGE can obtain only an injunction voiding the contract entered into by the City and Motorola. We must now determine whether the value of this injunctive relief to EGE is sufficiently measurable and certain to satisfy the $50,000 [now $75,000] amount in controversy requirement of the diversity statute.

* * *

Appendix C

> Any benefit that EGE could receive from the injunctive relief awardable by the district court — namely, the chance to rebid for the contract — is, in our view, too speculative and immeasurable to satisfy the amount in controversy requirement.

120 F.3d at 220-222 (footnote omitted) (emphasis supplied).

These expressions in *Ericsson GE* fit the present case like a glove. Fidelity is the **plaintiff** here. It is the **plaintiff's viewpoint** from which the amount in controversy is to be ascertained. What is the "value to Fidelity of the relief it seeks," *i.e.*, the right to have Kidd's claim against it decided by an arbitrator, as distinguished from its being decided by a court and/or jury? Plaintiff's bare, conclusory allegation that "the value to Fidelity of the relief sought herein exceeds $75,000" is no more than wishful jurisdictional thinking. It is virtually identical to the wishful thinking indulged by EGE in *Ericsson GE*. It may be, as Fidelity alleges, that an arbitrator would give Kidd more than $75,000 less than a court and jury would give him, but how can anybody know? When there is no reasonable way to predict the outcome of a controversy in one forum as opposed to another, the descriptive words "speculative" and "immeasurable" come to mind. It is simply impossible to measure, or to quantify with any degree of certainty, the "value to Fidelity" of the mere right to an arbitration proceeding. The ultimate conclusion reached by the Eleventh Circuit in *Ericsson GE* was:

> We therefore hold that EGE has failed to satisfy the $50,000 amount in controversy requirement of 28 U.S.C. § 1332.

120 F.3d at 222.

Purloining the Eleventh Circuit's precise and here appropriate language, this court finds that Fidelity "has failed to satisfy the $75,000 amount in controversy requirement of 28 U.S.C. § 1332."

A separate *sua sponte* order dismissing this action without prejudice will be entered.

DONE this 16th day of March, 1999.

s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 8, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-11095

FIDELITY WARRANTY SERVICES, INC.,

Plaintiff-Appellant,

versus

BILLY KIDD,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: BLACK, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing

en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE